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Supreme Court of the United States

OCTOBER TERM, 1967

No. 13

STEPHEN R. WAINWRIGHT,
Petitioner,

versus

CITY OF NEW ORLEANS,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF FOR RESPONDENT.

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OPINIONS BELOW

Correct as stated in Brief for Petitioner.

JURISDICTION

Correct as stated in Brief for Petitioner.

QUESTIONS PRESENTED

The City of New Orleans submits that all five of the questions presented by Petitioner are neither fitting nor true because they are unfounded in fact.

The City further submits that it established, in its Response to Petitioner's Application for Writs, Petitioner's complete misrepresentation in the handling and reporting of facts. Examples:

Petitioner's Question IV alleges that Petitioner Wainwright refused, BECAUSE HE SUFFERS FROM AN UNSIGHTLY SKIN DISEASE, to remove his clothing. Wainwright mentioned NOTHING ABOUT ANY SKIN DISEASE to the investigating officers, and this point didn't appear until much later in the case. Wainwright's refusal to bare his left forearm was an act of arbitrary petulance in the assertion of "rights" he "knew" he had but which really did not exist and is a prime example of what can happen so long as the person being investigated has the power to determine, unilaterally, how the police should conduct themselves and whether they are doing their job correctly in the subjective view of the one under investigation. Wainwright wanted to supervise the very investigation he was the subject of.

Petitioner's Question V grossly misstates a fact when Wainwright says his resistance to "the inspection of his body" was "by merely folding his arms across his chest in trying to keep his clothing on." Three courts of law have already found that Wainwright did much more than that; he was convicted of butting two police officers around from wall to wall; the testimony of those he assaulted and butted went uncontroverted in the court room, and the City repeats the request made in its Response brief that this Court weigh the facts as related by Wainwright and his forces IN BRIEF against those facts as they appear in the varied transcripts of the court proceedings when witnesses testified under oath before Wainwright and his attorneys.

The City makes part and parcel of this "Brief For Respondents" its 30-page "Response In Opposition To the Issuance of A Writ of Certiorari to the Supreme Court of Louisiana," filed into this record in December, 1966, including, especially, the 3-page Index which precedes it,

plus also the five Appendices, Appendix A through Appendix E.

STATUTES INVOLVED

Sections 42-25, Disturbing the Public Peace, and 42-85 (7), Vagrancy by Loitering, of the Code of the City of New Orleans, are correctly reported in the Brief of Petitioners.

But conspicuous by its absence from Petitioner's Brief are municipal ordinances setting forth the law on RESISTING AN OFFICER. Inasmuch as Wainwright was never convicted of Vagrancy, the validity of that ordinance is not properly before this court unless the Wainwright forces insist on testing the validity of the arrests.

But if that is the basis for an examination here of the Vagrancy ordinance, then the City is at a loss to understand why the Wainwright forces ignore a testing of the RESISTING AN OFFICER ordinance, because Wainwright was originally arrested on BOTH charges and the Brief for Petitioner concedes, at Page 6, the officers were "unable to say whether petitioner tried to walk away 'before or after he was told he was under arrest' (B. 177)"

The charge is Resisting An Officer and the ordinance states that this means "an individual acting in his official capacity AND AUTHORIZED BY LAW TO MAKE A LAWFUL ARREST, etc." Unfortunately, this law and others like it have all too long been popularly branded with the name "Resisting Arrest," and have been all too often interpreted to be limited to "Resisting Arrest" when there is no earthly reason to suppose that it would be the legislative will (or, for that matter, the judicial or executive will, either) to limit Resisting an Officer ONLY to those situations when an officer empowered to make an arrest

is making an arrest and ruling out any situation when an officer who has the power to make an arrest is performing other phases of police duties such as finger-printing, photographing, investigating, gathering evidence, etc.

It is the City's position that neither the Vagrancy ordinance nor the Resisting An Officer ordinance is properly before this court for its consideration, but the City submits, with respect, that if either can correctly be the subject of review by this Court, then so can the other.

So here are copies of the New Orleans municipal ordinances and the Louisiana Statute on RESISTING AN OFFICER:

> Section 49.1. **What constitutes resisting an officer.**
>
> Resisting an officer is the intentional opposition, resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity. (C.C.S., Ord. No. 18,142, § 1)
>
> Section 49.2. **Resistance unlawful.**
>
> It shall be unlawful for any person, by word or action, to resist an officer or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer. (C.C.S., Ord. No. 18,142, § 2)
>
> Article 108, Title 14, Revised Statutes of Louisiana. **Resisting an officer.**
>
> Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of prop-

erty, or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

Whoever commits the crime of resisting an officer shall be fined not more than three hundred dollars, or imprisoned for not more than six months, or both.

It is respectfully suggested that if "Resisting An Officer" is to be examined, that this court hold, especially in these troubled times of demonstrations, riots, and related disturbances, that Resisting An Officer means just that, the resisting of a duly qualified officer of the law in the performance of any official duty or act, and is not limited to only an act of arrest. The City requests this court to rule that state and local officers of the law, as well as federal officers, can, indeed, be resisted while performing duties prior to an arrest, as was held in *Amaya vs. United States*, C.A. Cal. 1957, 247 F. 2d 947, Certiorari denied 355 U.S. 916, 78 S. Ct. 346, 2 L. Ed. 2d 276, where an investigation was being made as to a violation of federal law.

Amaya, and U.S.C.A., Title 18, Section 111, and U.S. C.A., Title 18, Section 1114 clearly establish this to be the law at the federal level and concerning qualified federal officers.

Regarding the City's use of the Vagrancy ordinance as a holding charge, this is simply not true; it is simply not done in New Orleans, and it was not done in this Wainwright case. Mr. Justice Douglas, in his "Vagrancy and Arrest on Suspicion," was, we believe, condemning the practice of using any lesser charge as the basis for holding a person for investigation of a greater charge, a felony. New Orleans did not do this in the Stephen R.

Wainwright case, but if it is to be argued that vagrancy was employed as a holding charge here, then it can certainly be argued that so, too, was "Resisting An Officer" similarly employed, and an examination of the one, Vagrancy, certainly justifies an examination of the other, Resisting An Officer.

Further, there is no conflict in charging a person with both vagrancy and a felony if the vagrancy charge stands on its own feet and is not employed as merely a holding charge. There is no conflict because vagrants have been known to commit murder and murderers have been known to be vagrants, and if a vagrant or loiterer or drifter or idler happens to commit murder or armed robbery or some other felony, the murder, armed robbery or other felony makes him no less a vagrant, loiterer, drifter or idler. The City tried Wainwright for Vagrancy; and even though it was clearly established on the day of arrest that Wainwright was not the murder suspect sought, the City persisted in its Vagrancy charge and took him to Court, to trial as a Vagrant Loiterer.

STATEMENT OF THE CASE

The City's appreciation of the Statement of the Case is precisely that of Orleans Parish Criminal District Court Judge Thomas M. Brahney as stated in his Judgment, which is printed in full at Pages 41-47 of Stephen R. Wainwright's "Petition For A Writ of Certiorari to the Supreme Court of Louisiana."

A mere reading of that Judgment will accommodate the Respondent in several ways: It will present to this court the City's Statement of the Case as well as citation of authorities with which the City completely agrees, embraces in full as her own authorities, and which the City

now respectfully offers, at this point, as part and parcel of her own "Brief For Respondent."

THE ARGUMENT

For the most part, cases cited by the Wainwright forces fall into three categories * * * 4th, 5th, and 6th Amendment cases * * * **NONE** of which apply to this Wainwright vs. New Orleans matter. The breakdown:

SIXTH AMENDMENT

Gideon vs. Wainwright * * * Right to counsel **at trial** * * * no problem here; Wainwright was **ALWAYS** attended by counsel at all trials. So *Gideon vs. Wainwright* not applicable here.

FIFTH and SIXTH AMENDMENTS

The *Escobedo* and *Miranda* cases * * * Ruled out self-incriminatory statements (5th Amendment) if not first told of right to counsel (6th Amendment), right to silence, etc. * * * no problem here; Wainwright made no confessions or admissions so, of course, none are in the record. There are **NO CONFESSIONS** to **rule out** of evidence. Ergo, *Escobedo* and *Miranda* not applicable here.

FOURTH AMENDMENT

Most of the other cases cited by the Wainwright forces are 4th Amendment cases that deal with the suppression of evidence illegally seized, **but** there **IS NO EVIDENCE** in this **case** to suppress. No physical evidence was ever seized; the fact is, no physical evidence was ever sought. The only thing ever sought of Wainwright was **exculpatory** in nature, i.e., a glimpse at Wainwright's left forearm to see if he had a tattoo "Born to Raise Hell" on that left arm. Had the left forearm been bare of a tattoo, the "evidence" sought, i.e., a glimpse at that arm would have **exculpated** Wainwright. A tattoo on his arm could never have been incriminating; murders aren't done with tattoos, so the tat-

too could not be physical evidence of any crime, and the presence of a tattoo could not have incriminated Wainwright of anything, because other people have tattoos on their arms and everybody with tattoos on their left arm are not murderers.

WHAT ELSE IS LEFT?

Nothing, says the City of New Orleans.

The arrest and search, says the American Civil Liberties Union.

To which the City answers:

The ACLU's position appears to be: The original arrests being unlawful, any evidence seized in searches made incidental to those unlawful arrests must be suppressed. (But there is **NO EVIDENCE** to suppress, the record shows.)

The City's position:

(1) There was **NEVER** any evidence sought, seized or introduced in this case, so there is **NOTHING** to rule out of evidence.

(2) There was **NEVER** any search made in this case, neither at the scene of the arrest **NOR** at the police station, so the question should go begging as to whether a search was made incidental to an arrest.

First of all, there was NO SEARCH of Wainwright made at any time. When, at the Bourbon Street scene, Wainwright was ASKED (NEVER "Ordered," as Wainwright falsifies it) to remove his jacket, and he refused, **NOTHING HAPPENED.** He was not, then and there, arrested. He was questioned for another three minutes or more, during which time he THRICE tried to walk away from the police who were only doing their duty (and doing

it properly, patiently and well) of investigating murder in the metropolis which leads the nation with the highest murder rate in the United States.

The police testified in court that it is sound, standard, routine police procedure to have everyone remove their belts, ties, jackets — for the protection of the arrestees themselves and of other arrestees — because files, saws, certain types of weapons may be secreted within the jackets of outer garments. They testified that Wainwright was ordered to remove his jacket (like everyone else booked that night) ONLY AFTER EVERY OTHER ENTREATY and APPEAL TO REASON had FAILED. (See, especially, the testimony of Lt. Francis Martello, Pages 53 and 54 of Appendix B, Response brief.)

The police did inspect Wainwright's left forearm (the outer skin for marks of identification or lack of identification, if you will) after the jacket was removed. The jacket was removed not primarily to effect a search but to have Wainwright — who had been told from the beginning that he had a right to use the phone to call his attorney or anyone else he wished after he was booked, there being no point in using a precinct phone to tell someone, if you have not been booked, that you have been cleared—submit to the usual procedure of removing all ties, belts and jackets before being booked. Everyone else booked that night removed their belts, ties and jackets before being booked; other than satisfying a completely subjective, childish, petulant whim, why not Wainwright?

Just what constitutional guarantee was Wainwright asked to surrender?

The City submits that a mere reading of the 37-page Appendix B of her Response Brief, which Appendix B contains the entire transcript of the testimony in the Assault

cases of which Wainwright stands convicted, will clearly establish that it was Wainwright who conducted himself in an arbitrary, capricious, suspicious and furtive manner from the outset of this case and that the police were courteous, considerate, patient, anything but arbitrary, and literally pleaded with Wainwright to cooperate in the investigation of a murder in the community. They told him they did not want to arrest him, that a mere baring of his left forearm showing no tattoo would terminate the matter right there and Wainwright could go on about his business.

The police told Wainwright why he was being investigated, showed him the composite drawing of the wanted subject, explained that he fit that composite, and tried every way possible to gain Wainwright's cooperation.

There having been no search, there is no point in examining the lawfulness or unlawfulness of the arrests incidental to which the search was never made.

But if it is considered that there was a search, then that search was only for identifying marks or lack thereof, and Orleans Parish Criminal District Court Judge Thomas M. Brahney very adequately touched upon that subject in his appellate decision (which, significantly enough, was favorable to Petitioner inasmuch as it reversed one of three charges —resisting an officer — on which Wainwright had been convicted in Municipal Court). See Judgment, pages 41-47 of Stephen R. Wainwright's "Petition For A Writ of Certiorari to the Supreme Court of Louisiana," especially:

Page 42, *People v. Estrialgo*, 37 Misc. (2) 264, 233 N.Y.S. 2d 558, and:

Pages 44-45, the entire paragraph quoted from 21

Am. Jur. 2d 368, especially but not exclusively the language, "Thus, a suspect has been required to * * * submit to a physical examination of his body * * * ."

Throughout the various and varied Wainwright briefs there seems to be agreement that the quest was for the presence or absence of identifying marks, so we do not appear to be at issue on this point.

But, at the VERY WORST, if there was a search, it was — at the VERY EXTREME — but a strip search, an examination of the outer skin of Wainwright's person, of his left forearm, and:

STRIP SEARCHES ARE NOT UNLAWFUL

See: *Henderson vs. U. S.* 7/7/67, reported in 1 Criminal Law Reporter, at page 2275. Argument by the City of New Orleans:

The City has steadfastly maintained, throughout the history of this case, that there was **no search** at all ever made of this defendant, Stephen R. Wainwright; that at the initial Bourbon Street scene he was merely asked, requested, (**NOT ORDERED**, as Wainwright contends) to remove his jacket so the police could examine his left forearm for **exculpatory** evidence which would have ended the matter right there. But if there was any search, it was at worst a **strip search**, and a strip search is not unlawful.

"I think we will agree," wrote Ninth Circuit Judge Chambers in *Henderson v. U. S.*, *supra*, "that Schmerber (*Schmerber v. California*, 384 U.S. 757, 1966) deals specifically with an invasion, rather than an examination of one's body."

"Both Schmerber, generally, and the 'clear indication'

test, specifically, are concerned with searches involving intrusions of the body, not with strip searches.

"I find nothing in Schmerber," Judge Chambers wrote, "to compel reversal of *Witt v. United States*, 9 Cir., 287 F. 2d 389, where this court held that strip search was not unlawful."

CONCLUSIONS

1. The City of New Orleans should be maintained in its conviction of Stephen R. Wainwright for the simple reason that Wainwright was convicted of assaulting two officers of the New Orleans Police Department, and evidence in support of that conviction has gone uncontroverted. There are no other matters properly before this court.

2. The convictions on assaulting two police officers depend in no wise on any confessions or admissions by Wainwright; they depend in no wise on any physical evidence because none was sought, seized nor introduced in the case.

3. There is **NO EVIDENCE** to suppress in this case, consequently there is no basis for examining arrests incidental to which no search was ever made.

4. But if what happened in this Stephen R. Wainwright case IS considered a search, then it is a lawful search which Wainwright should be faulted for resisting and which the police should not be penalized for making.

The majority in *Schmerber vs. California* have held that evidence seized in an actual intrusion of the body is admissible, so if it be the law of the land that a person's blood vessels can be punctured to obtain incriminatory evidence it can be no less the law of the land to allow a

cursory examination of the outer skin of one's body for the absence or presence of mere marks of identification, as in the instant Stephen R. Wainwright case.

5. There is nothing in the record (as sharply contrasted to contrary allegations in Wainwright's brief) that would justify reversing his convictions of assaulting two police officers who were doing their duty, under orders, and doing it patiently and well.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the above and foregoing Brief for Respondent was this date sent to counsel for the Petitioner by United States Mail, postage prepaid, addressed to them at their offices as follows:

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